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No. 85-568

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IN THE
Supreme Court of the United States

October Term, 1985

NANTAHALA POWER AND LIGHT COMPANY,
TAPOCO, INC., and ALUMINUM COMPANY
OF AMERICA,

Appellants,

v.

STATE OF NORTH CAROLINA ex rel. UTILITIES
COMMISSION; LACY H. THORNBURG,
Attorney General, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF
NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE

AND

BRIEF OF UNITED STEELWORKERS OF
AMERICA, AFL-CIO AND ITS LOCAL UNION 309
AS *AMICUS CURIAE* IN SUPPORT OF THE
JURISDICTIONAL STATEMENT

CARL B. FRANKEL
Counsel of Record
United Steelworkers of
America, AFL-CIO

Five Gateway Center
Pittsburgh, PA 15222
(412) 562-2541

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Now comes United Steelworkers of America, AFL-CIO and its Local Union 309 (jointly referred to as "the Union") and respectfully submit this Motion for Leave to File Brief as *Amicus Curiae* in Support of the Jurisdictional Statement, pursuant to Rules 36 and 42 of the Rules of the United States Supreme Court. The brief is conditionally attached to this motion and lodged herewith. In support thereof, the Union states as follows:

1. The above-captioned matter is before the Court pursuant to Appellants' appeal from a judgment entered on July 3, 1985 by the North Carolina Supreme Court upholding certain orders of the North Carolina Utilities Commission ("NCUC") which required, *inter alia*, Appellant Aluminum

Company of America (herein "Alcoa") to pay a refund of approximately \$29 million to the North Carolina customers of its subsidiary, Nantahala Power & Light Company (herein "Nantahala").

2. Succinctly, Alcoa alleges that the NCUC orders should not have been upheld because, *inter alia*, the NCUC improperly regulated matters subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission and impermissibly burdened interstate commerce in the generation, transmission, and sale of electricity. Alcoa asserts that the effect of these orders may be to force curtailment of production of its smelting and fabricating facilities in Alcoa, Tennessee (herein "Tennessee facilities") resulting in diminished employment opportunities for the Union's members.

3. The Union is the collective bargaining agent for some 3,500 Alcoa employees working in the Tennessee facilities, and represents those employees with regard to their wages, hours, and other working conditions and terms of employment. The interest of the Union in this matter is the job security of all individual Union members who are employed by Alcoa and are represented by the Union and whose continued full-time employment at the Tennessee facilities the Union seeks to protect. Curtailment of Alcoa's operations at these facilities may directly and adversely impact upon the lives and well-being of the Union's members.

4. The interests of the Union are not in all respects those of Alcoa. While the Union's interests in preserving full employment at the Tennessee facilities is shared by Alcoa to a degree, should the judgment of the North Carolina Supreme Court be

upheld and, as a result, energy costs, a significant component in the cost of producing aluminum, escalate, Alcoa may reasonably be expected to maintain profit levels by shifting production to facilities outside of Tennessee where production costs are lower. That would cause serious harm to Union members employed at the Tennessee facilities. Thus, Alcoa's economic interests are not co-terminous with the Union's interest in preserving employment. The filing of this brief as *amicus curiae* is desirable therefore, as it places before the Court arguments on behalf of a separate, substantial employee interest advocated by no other party in this proceeding.

5. Counsel for the North Carolina Appellees has refused to consent to the Union's filing of a brief as *amicus curiae*. Other parties have consented.

CONCLUSION

For the foregoing reasons, this Motion for Leave to File Brief as *Amicus Curiae* should be granted.

Respectfully submitted,

CARL B. FRANKEL
Counsel of Record
United Steelworkers of
America, AFL-CIO
Five Gateway Center
Pittsburgh, PA 15222
(412) 562-2541

QUESTION PRESENTED

Whether the State of North Carolina, acting through its Utilities Commission in the context of establishing retail electric rates under North Carolina law, unlawfully burdened interstate commerce by effectively increasing the cost of electricity to consumers in Tennessee through rate-making devices which discriminate in favor of North Carolina consumers.

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PARTIES TO THIS PROCEEDING

The parties to this proceeding are set forth in the
Jurisdictional Statement.

OPINION BELOW

The opinion below is reproduced in the Appendix to
the Jurisdictional Statement and reported at 313 N.C.
614 (1985).

JURISDICTION

This Court has jurisdiction pursuant to 26 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are reproduced in the Jurisdictional Statement and the statutory provisions involved are reproduced in the Appendix to the Jurisdictional Statement.

INTEREST OF THE UNION

The United Steelworkers of America, AFL-CIO and Local Union 309 ("Union") is the collective bargaining agent for some 3,500 employees working in Alcoa's aluminum manufacturing plant located in Alcoa, Tennessee ("Tennessee facilities"). The interest of the Union here is the job security of all Steelworker-represented workers employed at the Tennessee facilities and whose continued full-time employment at these facilities the Union seeks to protect.

The effect of the orders of the North Carolina Utilities Commission ("NCUC") at issue is to establish an economic preference in favor of North Carolina consumers by transferring to North Carolina the economic benefits of inexpensive hydroelectric energy historically used to operate the Tennessee facilities. As a result, the cost of energy to Alcoa will increase substantially. This, in turn, will substantially raise the cost of producing aluminum at the Tennessee facilities inasmuch as energy is a significant component of that cost. If the NCUC's orders are upheld, therefore, Alcoa may well shift production to facilities outside Tennessee to the considerable peril of 3,500 Union members at the Tennessee facilities. This brief is submitted in furtherance of

the interests of those Tennessee workers in this interstate controversy.

STATEMENT OF THE CASE

The Union adopts the Statement of the Case presented in the Jurisdictional Statement.

SUBSTANTIAL QUESTIONS ARE PRESENTED

North Carolina Cannot Lawfully Use Its Utility Rate Authority To Impose An Economic Preference In Favor Of Its Citizens Over Consumers In Another State.

In the Jurisdictional Statement, Appellants argue that the NCUC's orders interfere with the exclusive jurisdiction of the Federal Energy Regulatory Commission to regulate the manner in which electric energy is allocated and sold in interstate commerce, and that the North Carolina Supreme Court erred in failing to find the NCUC's orders in violation of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.* and the Commerce Clause of the United States Constitution. U.S. Const., Art. I, § 8, cl. 3. The Union will not repeat the arguments made in the Jurisdictional Statement, but respectfully submits to the Court that the potential impact of the NCUC's actions on the Union's members in Tennessee further emphasizes the importance of having the economic issues raised in this controversy resolved by an impartial federal tribunal. Unless the Court notes probable jurisdiction, the substantial interests of Tennessee parties, including the Union, will have been adjudicated by North Carolina tribunals whose stated objective was to maximize economic benefits to the North Carolina customers of Nantahala Power and Light Company ("Nantahala").

The NCUC orders of which Appellants complain were adopted pursuant to the instructions of the North Carolina Supreme Court that the NCUC only consider what was in the "best interests" of Nantahala's North Carolina customers. *North Carolina ex. rel. Utilities Commission v. Edmisten*, 299 N.C. 432, 434, 263 S.E.2d 583, 586 (1980). Nothing in the subsequent orders of the NCUC or the North Carolina Supreme Court's decision below gives any consideration whatsoever to the detrimental effect that the NCUC's actions may have on the economy of Eastern Tennessee or the jobs of the Union's members. The fact that NCUC found that North Carolina had "first call" (App. 183a) on the economic benefits of the inexpensive hydroelectric generation of North Carolina and Tennessee by Alcoa's electric company subsidiaries makes it clear that Tennessee's interests were not considered.

The Court has been vigilant in enforcing the Commerce Clause to prevent the individual states from using their regulatory powers to engage in narrow economic protectionism. A very recent example, in a case which is on all fours with the facts here, is *New England Power Company v. New Hampshire*, 455 U.S. 331 (1982) ("NEPCO"). In that case, faced, as in this instance, with a state using its electric rate-making authority to appropriate for its citizens the economic advantages of hydroelectric generation in interstate commerce, the Court stated:

Our cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its

borders or to the products derived therefrom. [citations omitted].

* * *

The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. The Commission has made it clear that its order is designed to give an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states.

455 U.S. 331, 338-9

The substantiality of the questions presented in this case follows *a fortiori* from *NEPCO*.¹

1. A recent decision by the Eighth Circuit underscores the point. In *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), the Arkansas Public Utilities Commission sought to preclude an Arkansas utility from participating (taking power and sharing costs) in a nuclear power project designed to serve the power needs of four states. The cost and power allocations had been determined in proceedings before the FERC. The State Commission nevertheless set out to circumvent those allocations because, in its view, they portended enormous rate increases for Arkansas retail consumers and because Arkansas neither wanted nor needed the relatively high-cost power from the project. Finding that Arkansas' express concern was the economic impact on its citizens caused by the utility's participation in the project and the effects of that state's action would have been to shift the burden to the citizens of the other three states, the Court concluded that the Commission's conduct constituted a direct and substantial burden on interstate commerce in violation of the Commerce Clause. Accordingly, it sustained a judgment enjoining the Arkansas Commission from proceeding.

The economic protectionist motives of the NCUC in the instant case could not be clearer. The NCUC's first order (issued before the Court's *NEPCO* opinion) brazenly states that North Carolina consumers are entitled to "first call" on the combined hydroelectric generation of Nantahala and Tapoco, Inc., which includes the inexpensive power supply to the Tennessee facilities. Although subsequent statements of the NCUC and the North Carolina Supreme Court have attempted to disavow the "first call" language, it is apparent from the record of the proceedings that the NCUC orders do in fact result in a preference in favor of North Carolina consumers for this low-cost supply of electricity. Moreover, the North Carolina Supreme Court candidly admitted that the NCUC orders result in the imposition of higher power supply costs on Alcoa's industrial operation in Tennessee (App. 70a).

It is not surprising that a state agency such as the NCUC would favorably consider only the parochial interests of its local constituents. But to allow the NCUC to place those local interests above, and at the expense of, the legitimate interests of a neighboring state, including the Tennessee workers at peril here, would disrupt the functioning of the unified national economy that the Commerce Clause intended to create and protect. Should the NCUC or Nantahala's customers have any legitimate complaint concerning the manner in which Nantahala incurs power supply costs through regulated wholesale rate schedules, a full and effective remedy is available in a federal forum, the Federal Energy Regulatory Commission.

If the decision of the North Carolina Supreme Court is allowed to stand, it will invite similar actions by other states hoping to circumvent orders of the FERC to the

advantage of their own citizens. Yet, those orders were issued on the basis of impartial consideration of competing interests among several states, and the Commerce Clause embodies the judgment of our founders that no one state may perform that office in matters comprehended by the Clause.

CONCLUSION

For the reasons stated above, the Court should note probable jurisdiction and set the case for argument on the merits.

Respectfully submitted:

CARL B. FRANKEL

Counsel of Record

United Steelworkers of
America, AFL-CIO
Five Gateway Center
Pittsburgh, PA 15222
(412) 562-2541

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